

8-11-2014

## State v. Bradley Appellant's Brief Dckt. 41539

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 41539
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY
v.	)	NO. CR 2013-2217
	)	
DWAYNE A. BRADLEY,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	

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**BRIEF OF APPELLANT**

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APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI

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HONORABLE BENJAMIN R. SIMPSON  
District Judge

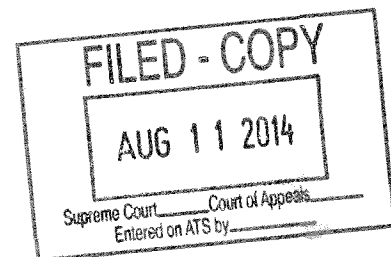
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SARA B. THOMAS  
State Appellate Public Defender  
State of Idaho  
I.S.B. #5867

ERIK R. LEHTINEN  
Chief, Appellate Unit  
I.S.B. #6247

BEN P. MCGREEVY  
Deputy State Appellate Public Defender  
I.S.B. #8712  
3050 N. Lake Harbor Lane, Suite 100  
Boise, ID 83703  
(208) 334-2712

KENNETH K. JORGENSEN  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534



ATTORNEYS FOR  
DEFENDANT-APPELLANT

ATTORNEY FOR  
PLAINTIFF-RESPONDENT

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## STATEMENT OF THE CASE

### Nature of the Case

A jury found forty-one-year-old Dwayne A. Bradley guilty of felony trafficking in methamphetamine. The district court imposed a unified sentence of twelve years, with three years fixed. On appeal, Mr. Bradley asserts that the district court abused its discretion when it admitted certain audio recordings into evidence, or alternatively that it abused its discretion when it denied his motion for a new trial because it erred deciding a question of law arising during the course of the trial, when it admitted the recordings into evidence. Mr. Bradley also asserts that the district court erred when it denied his motion for judgment of acquittal, because the evidence presented to the jury was insufficient to convict him of trafficking in methamphetamine. Additionally, Mr. Bradley asserts that the district court abused its discretion when it imposed his unified sentence of twelve years, with three years fixed, because the indeterminate portion of the sentence is excessive.

### Statement of the Facts and Course of Proceedings

The State filed a Criminal Complaint alleging that Mr. Bradley had committed the crime of trafficking in methamphetamine, felony, in violation of Idaho Code § 37-2732B(a)(4). (R., pp.24-25.) After a preliminary hearing, the magistrate found probable cause and bound Mr. Bradley over to the district court. (R., p.62.) The State then filed an Information charging Mr. Bradley with the above offense. (R., pp.63-64.) He entered a not guilty plea. (R., pp.69-70.)

The case proceeded to a jury trial. (R., pp.122-30, 135-39.) After the opening statements, the district court granted the State's motion to amend the Information.

(Tr., p.94, L.23 – p.99, L.8.)<sup>1</sup> The Amended Information charged Mr. Bradley with trafficking in methamphetamine, through knowingly possessing methamphetamine in an amount represented to be 28 grams or more. (R., pp.133-34.) The district court granted the motion to amend the Information because the amendment clarified the State’s theory of the case that Mr. Bradley represented that the weight was 28 grams or more. (See Tr., p.95, Ls.15-24, p.96, L.14 – p.97, L.8.)

During the trial, Sergeant Eric Hildebrandt with the Kootenai County Sheriff’s Office testified that, after Robert Wyman was arrested for possession of methamphetamine with the intent to distribute, he instructed Mr. Wyman to call “Cecil.” (Tr., p. 98, L.15 – p.99, L.4, p.107, L.5 – p.108, L.9.) “Cecil” was the name by which Mr. Wyman knew Mr. Bradley. (Tr., p.108, Ls.9-10.) Sergeant Hildebrandt testified that Mr. Wyman made the call from an interview room at the Kootenai County Sheriff’s Office, that he was there the entire time Mr. Wyman was speaking, and that he recorded the call. (Tr., p.108, L.11 – p.109, L.7.) About half an hour to forty-five minutes later, a second call was made. (Tr., p.110, Ls.4-8.) Sergeant Hildebrandt also recorded the second call from the same interview room. (Tr., p.110, Ls.9-15.)

Additionally, Sergeant Hildebrandt testified during his direct examination that, when drug deals are arranged over the telephone, in lieu of plain English the participants often use “different words to cover what it is they are doing.” (Tr., p.102, Ls.7-11.) According to Sergeant Hildebrandt’s testimony, “If they want a full ounce, it will be a ‘full’ or a ‘whole one.’” (Tr., p.102, Ls.12-14.)

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<sup>1</sup> All citations to “Tr.” in this brief refer to the 221-page Transcript on Appeal, which includes transcripts of the August 5, 2013 and August 6, 2013 jury trial, the October 2, 2013 motion for new trial hearing, and the October 9, 2013 sentencing hearing. (Tr., p.2.) All citations to other transcripts not included in the 221-page Transcript on Appeal will include the date of the hearing in the citation.



Sergeant Hildebrandt testified that he had reviewed the audio recordings of the two calls, that they were accurate recordings of the calls, and that he recognized Mr. Wyman's voice as one of the two voices on the calls. (Tr., p.109, L.8 – p.111, L.7.) Deputy Mark Ellis of the Kootenai County Sheriff's Office also testified that he had reviewed the recordings, and he recognized the two voices on the recordings as Mr. Bradley and Mr. Wyman. (Tr., p.119, Ls.2-13.)

Over Mr. Bradley's objection, the district court admitted the audio recordings into evidence and the State published them to the jury. (Tr., p.119, Ls.14-18, p.122, L.12 – p.123, L.5.) During the first call, Mr. Wyman purportedly told Mr. Bradley, "I'm going to need a whole one." (State's Ex. 1, 00:18-00:21.) During the second call, Mr. Bradley and Mr. Wyman supposedly agreed to meet at a Pawn 1 store in about fifteen minutes. (State's Ex. 2, 00:33-00:46.) Mr. Bradley then purportedly asked Mr. Wyman, "Do you want a full?" (State's Ex. 2, 00:49-00:53.) Mr. Wyman replied, "Yeah." (State's Ex. 2, 00:53-00:55.)

Deputy Ellis testified that he met with Sergeant Hildebrandt and Mr. Wyman before going to the Pawn 1 and parking nearby. (Tr., p.115, L.6 – p.117, L.8.) About fifteen minutes later, he saw two patrol deputies initiate a traffic stop on a blue pickup truck and detain the driver, Mr. Bradley. (Tr., p.117, L.9 – p.118, L.11.) Deputy Ellis testified that he searched the truck and found a can with a fake bottom inside. (Tr., p.119, L.19 – p.120, L.3.) Upon opening the fake bottom, he found a plastic bag containing a white crystal substance that he believed to be methamphetamine. (Tr., p.120, Ls.6-9.)

Annie Nord, the lab manager at the Idaho State Police Forensic Lab in Coeur d'Alene, testified that testing indicated that the crystal substance contained

methamphetamine. (Tr., p.139, Ls.5-12, p.145, Ls.10-18.) She also testified that the weight of the crystal substance was 27.63 grams. (Tr., p.146, Ls.4-18.) An ounce is 28.35 grams. (Tr., p.146, Ls.19-20.)

After the end of testimony, Mr. Bradley requested that the charges be dismissed for insufficient proof under Idaho Criminal Rule 29, the rule governing motions for a judgment of acquittal. (See Tr., p.151, L.23 – p.152, L.5.) Mr. Bradley essentially asserted that there was insufficient evidence of a sale or delivery, and that there was insufficient evidence that Mr. Bradley had represented the weight of the substance.<sup>2</sup> (See Tr., p.152, Ls.12-14; see also R., pp.96-99 (Mr. Bradley's arguments for why there was insufficient evidence); Tr., p.8, L.4 – p.10, L.5 (same).) The district court denied the oral motion for a judgment of acquittal. (Tr., p.152, Ls.10-20.) The jury later found Mr. Bradley guilty of trafficking in methamphetamine. (R., pp.171-72.)

Mr. Bradley then filed a Motion for New Trial pursuant to I.C. §§ 19-2406(4), (5) and (6), on the grounds that the audio recordings were admitted contrary to the rules of evidence, hearsay was admitted contrary to the rules of evidence, the jury instructions did not accurately define the crime, and the verdict was not sustainable under the evidence presented. (R., pp.174-75.) The district court denied the motion for a new trial. (R., pp.183-02.)

At the sentencing hearing, the State recommended a unified sentence of twelve years, with four years fixed, and Mr. Bradley recommended a unified sentence of six years, with the mandatory minimum of three years fixed. (R., pp.204-05.) The district

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<sup>2</sup> Mr. Bradley told the district court that his arguments in favor of granting the motion for judgment of acquittal "are exactly the same as the [pre-trial] motion to dismiss." (See Tr., p.152, Ls.12-15.) The district court had denied the motion to dismiss after a hearing. (Tr., p.14, L.9 – p.15, L.8.)

court imposed a unified sentence of twelve years, with the mandatory minimum of three years fixed. (R., pp.205, 213-15.)

Mr. Bradley filed a Notice of Appeal timely from the district court's sentencing decision. (R., pp.207-08.) Mr. Bradley also filed a Motion for Stay of Sentence. (R., pp.211-12.) The district court then issued an Order Staying Execution of Sentence pending Mr. Bradley's appeal. (R., pp.216-17.)

Mr. Bradley subsequently filed an Idaho Criminal Rule 35 motion for a reduction of sentence. (R., p.218.) The district court denied the Rule 35 motion. (R., p.224.) On appeal, Mr. Bradley does not challenge the denial of the Rule 35 motion.<sup>3</sup>

The State then filed a Motion to Reconsider Stay of Execution of Sentence (R., p.239), as well as a Brief in Support of Motion to Reconsider Stay of Execution of Sentence. (R., pp.225-27.) The district court then issued an Order Releasing Defendant. (R., p.240.)

At the hearing on the State's motion to reconsider, the district court vacated the Order Staying Execution of Sentence and the Order Releasing Defendant. (R., pp.248-51.) The district court then notified Mr. Bradley that he could file a new motion for stay of sentence with the district court or with the Idaho Supreme Court. (R., p.249.)

Mr. Bradley filed a second motion for stay of execution of judgment with the district court. (See R., p.257.) The district court, with a new presiding judge, denied the second motion for stay. (R., pp.255-58.)

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<sup>3</sup> The Idaho Supreme Court has held that "[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." *State v. Huffman*, 144 Idaho 201, 203 (2007). "An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information." *Id.*

## ISSUES

1. Did the district court abuse its discretion when it admitted the audio recordings of the telephone calls into evidence, because the State did not provide proper foundation to admit them?
2. Did the district court err when it denied Mr. Bradley's oral Idaho Criminal Rule 29 motion for judgment of acquittal, because the evidence presented to the jury was insufficient to convict him of trafficking in methamphetamine?
3. Did the district court abuse its discretion when it imposed a unified sentence of twelve years, with three years fixed, upon Mr. Bradley following his conviction for trafficking in methamphetamine?

## ARGUMENT

### I.

#### The District Court Abused Its Discretion When It Admitted The Audio Recordings Of The Telephone Calls Into Evidence, Because The State Did Not Provide Proper Foundation To Admit Them

Mr. Bradley asserts that the district court abused its discretion when it admitted the audio recordings of the telephone calls into evidence, because the State did not provide proper foundation to admit them. The State did not provide proper foundation to admit the recordings into evidence because it did not sufficiently authenticate them. The State did not sufficiently authenticate the recordings because it did not show they were complete and accurate representations of the telephone conversations. The State will be unable to prove beyond a reasonable doubt that the district court's error in admitting the recordings into evidence is harmless. Mr. Bradley's conviction should therefore be vacated.

Alternatively, the district court abused its discretion when it denied Mr. Bradley's motion for a new trial, because the district court erred in deciding a question of law arising during the course of the trial, when it admitted the audio recordings of the telephone calls into evidence. Mr. Bradley is entitled to a new trial because the error affected a substantial right.

#### A. The District Court Abused Its Discretion When It Admitted The Audio Recordings Into Evidence

Mr. Bradley objected to the admission of the audio recordings because proper foundation had not been laid for their admission. (Tr., p.136, Ls.1-15.) As Mr. Bradley's counsel explained, "No one was able to testify that either one of those exhibits completely, fairly, and accurately represented the entire conversation between those

two people. All you had was two law enforcement officers saying they recognized voices. That's it. They can't lay the foundation necessary for the admission of those CDs." (Tr., p.136, Ls.4-10.) The district court found "there is sufficient foundation between the two officers to establish the authenticity and the completeness of the record," and overruled the objection. (Tr., p.137, Ls.2-8.) However, the State actually did not provide proper foundation to admit the recordings into evidence because it did not sufficiently authenticate them.

1. Standard Of Review And Applicable Law

"The trial court has broad discretion in the admission of evidence, and its judgment will be reversed on appeal only when there has been an abuse of discretion." *State v. Bush*, 131 Idaho 22, 34 (1997). "Whether evidence admitted by the trial court is supported by a proper foundation is reviewable under an abuse of discretion standard." *Id.* When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the district court correctly perceived the issue as one of discretion, (2) whether the district court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and (3) whether the district court reached its decision by an exercise of reason." *State v. Hedger*, 115 Idaho 598, 600 (1989).

Because the State contended that the audio recordings were of telephone conversations between Mr. Bradley and Mr. Wyman, the State had to provide proper foundation for their admission into evidence. See *State v. Joy*, 155 Idaho 1, 15 (2013). Thus, the State had to authenticate the recordings. See *id.* The Idaho Rules of Evidence provide that: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims.” I.R.E. 901(a). One example of “authentication conforming with the requirements of this rule” is “[t]estimony of a witness with knowledge that a matter is what it is claimed to be.” I.R.E. 901(b)(1). Another example is a telephone conversation “by evidence that a call was made to the number assigned at the time by the telephone company to a particular person . . . if . . . circumstances, including self-identification, show the person answering to be the one called.” I.R.E. 901(b)(6)(A).

Idaho civil case law suggests that whether audio recordings were complete and accurate impacts whether the recordings have been sufficiently authenticated. See *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 770-71 (2011); *Alderson v. Bonner*, 142 Idaho 733, 737-38 (Ct. App. 2006). This proposition accords with the approach taken by some of Idaho's neighboring jurisdictions with respect to authenticating audio recordings. For example, the Washington Supreme Court has outlined the following requirements for the admission of tape recordings:

(1) It must be shown that the mechanical transcription device was capable of taking testimony. (2) It must be shown that the operator of the device was competent to operate the device. (3) The authenticity and correctness of the recording must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress.

*State v. Smith*, 540 P.2d 424, 428 (Wash. 1975) (quoting *State v. Williams*, 301 P.2d 769, 772 (Wash. 1956)). Similar rules have been adopted by courts in Oregon, *State v. Miller*, 487 P.2d 1387, 1389-90 (Or. Ct. App. 1971) (applying the same seven requirements from *Smith*), and Utah, *Chen v. Stewart*, 123 P.3d 416, 426 (Utah 2005) (“While a proponent may find it beneficial to demonstrate most, if not all, of the factors

discussed in *State v. Smith*, [540 P.2d 424, 428 (Wash. 1975)], he is not required to do so as long as the evidence is otherwise sufficient.”)

2. The State Did Not Provide Proper Foundation To Admit The Audio Recordings Into Evidence, Because It Did Not Sufficiently Authenticate Them

The State did not provide proper foundation to admit the audio recordings into evidence, because it did not sufficiently authenticate them. With the above standards from Idaho and neighboring jurisdictions in mind, the State did not sufficiently authenticate the recordings here because it did not show they were complete and accurate representations of the telephone conversations. Contrary to the district court’s determination, the officers’ testimony did not establish the accuracy and completeness of the recordings. Although Sergeant Hildebrandt testified that the recordings were accurate (Tr., p.109, Ls.20-23, p.110, L.25 – p.111, L.2), on cross examination he testified that he did not clearly hear the entirety of both sides of the phone conversations while they were going on. (Tr., p.113, L.18 – p.114, L.16.) Sergeant Hildebrandt stated, “I could hear part of what was being said on the other end of the line, but I couldn’t hear every word.” (Tr., p.113, Ls.20-21.) Additionally, while Sergeant Hildebrandt recognized Mr. Wyman’s voice (Tr., p.111, Ls.6-7), he testified that he did not recognize the other voice, but the phone number called was identified as “Cecil” on Mr. Wyman’s phone. (Tr., p.111, Ls.12-25.)

Deputy Ellis testified that he recognized the two voices on the audio recordings as Mr. Bradley and Mr. Wyman, (Tr., p.119, Ls.2-13), and that he came to recognize Mr. Bradley’s voice after speaking with him in the parking lot of the Pawn 1. (Tr., p.118, L.22 – p.119, L.1.) However, on cross examination, Deputy Ellis testified that he was in



an adjacent part of the jail during the first call, and that he was not at the jail at all when the second call occurred. (Tr., p.127, Ls.5-16.)

Thus, the State did not sufficiently authenticate the audio recordings because it did not show they were complete and accurate representations of the telephone conversations. See *Harris, Inc.*, 151 Idaho at 770-71; *Alderson*, 142 Idaho at 737-38; see also *Smith*, 540 P.2d at 428 (holding that the accuracy and correctness of a tape recording must be established to admit the recording into evidence). While Sergeant Hildebrandt was present with Mr. Wyman during the calls, he testified that he did not clearly hear both sides of the conversations. (See Tr., p.113, L.18 – p.114, L.16.) Thus, Sergeant Hildebrandt's testimony did not establish that the recordings were accurate and complete, because it could not show "that changes, additions, or deletions have not been made." See *Smith*, 540 P.2d at 428. Because Sergeant Hildebrandt "couldn't hear every word" on the other end of the line (see Tr., p.113, Ls.21-22), he was unable to confirm that the recordings' representations of what was said on the other end of the line during the conversations was complete and accurate.

Deputy Ellis's testimony also did not establish that the audio recordings were accurate and complete. He was not even present in the interview room for either call. (See Tr., p.127, Ls.5-16.) His testimony about identifying the voices on the recordings therefore did not establish that the recordings were complete and accurate representations, because it could not show "that changes, additions, or deletions have not been made" to either side of the conversations. See *Smith*, 540 P.2d at 428. Because Deputy Ellis was not present for the calls when they occurred, he had no way to know if any alterations had been made to the recordings. Thus, because the State

did not show that the recordings were complete and accurate representations, it did not sufficiently authenticate the recordings.

Because the State did not sufficiently authenticate the audio recordings, it did not provide proper foundation to admit the recordings into evidence. Thus, the district court abused its discretion when it admitted the recordings into evidence.

3. The State Will Be Unable To Prove Beyond A Reasonable Doubt That The District Court's Error In Admitting The Audio Recordings Is Harmless

The State will be unable to prove beyond a reasonable doubt that the district court's error in admitting the audio recordings is harmless. Once a defendant appealing from an objected-to error has shown that the error occurred, "the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 222 (2010). "To meet that burden, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Joy*, 155 Idaho at 11 (2013).

To say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous.... To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

*Id.* (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991), *overruled in part on other grounds by Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991)). "Thus, an appellate court's inquiry 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)) (emphasis in original).

Rather than being harmless, the district court's error in admitting the audio recordings into evidence here is reversible. The State will not be able to establish that the error is harmless beyond a reasonable doubt, because the admission of the recordings into evidence contributed to the verdict. The State's theory of the case was that Mr. Bradley "represented" that the weight of the substance was 28 grams or more pursuant to I.C. § 27-2732B(c). (See Tr., p.95, Ls.15-24, p.96, L.14 – p.97, L.8.) In its closing argument, the State told the jury, "You've probably realized by now there is really only one issue in this particular case, and that issue [is] was there a representation here." (Tr., p.165, Ls.13-16.)

The audio recordings were crucial to the State's case against Mr. Bradley, because they ostensibly provided evidence that Mr. Bradley represented the weight of the substance. The State invoked the recordings numerous times during its closing argument, telling the jury that the "whole one" and "full" statements from the recordings were two of the "three pieces of evidence to consider when you are thinking about whether or not there is the proof" that Mr. Bradley represented the weight. (See Tr., p.168, L.16 – p.169, L.13.) Regarding the recording of the second call, the State told the jury, "I'm sure you will probably want to listen to this again." (Tr., p.168, L.21.) According to the State, the second call contained Mr. Bradley's representation, and the first call provided corroboration. (Tr., p.168, L.18 – p.169, L.13.) Because the recordings were crucial to the State's case, it cannot be said that the erroneous admission of the recordings "did not contribute to the verdict obtained." See *Joy*, 155 Idaho at 11. Thus, the State will be unable to prove beyond a reasonable doubt that the district court's error in admitting the recordings is harmless.

The district court abused its discretion when it admitted the audio recordings into evidence, and the State will be unable to prove beyond a reasonable doubt that the district court's error in admitting the recordings is harmless. Mr. Bradley's conviction should be vacated.

B. The District Court Abused Its Discretion When It Denied Mr. Bradley's Motion For A New Trial

After the trial, Mr. Bradley filed a Motion for New Trial pursuant to I.C. §§ 19-2406(4), (5) and (6) on four grounds, the relevant ground here being that the audio recordings were admitted contrary to the rules of evidence. (R., pp.174-75.) The district court found "that the State laid a proper foundation that the recorded phone calls represented a true and accurate depiction of the recorded conversations." (R., p.190.) Thus, the district court concluded "that Defendant is not entitled to a new trial based upon the admission of the recordings." (R., p.190.) However, the district court abused its discretion when it denied Mr. Bradley's motion for a new trial, because the district court actually erred in deciding a question of law arising during the course of the trial when it admitted the audio recordings of the telephone calls into evidence. The district court's error entitles Mr. Bradley to a new trial, because the error affected a substantial right.

1. Standard Of Review And Applicable Law

An appellate court reviews a denial of a motion for new trial for an abuse of discretion. *State v. Ellington*, 151 Idaho 53, 72 (2011). "Because a motion for new trial involves mixed questions of law and fact, an abuse of discretion will be found if the trial court's findings of fact are not supported by substantial evidence or if the trial court does not correctly apply the law." *Id.* (internal quotation marks and alteration omitted).

Idaho Code § 19-2406 “sets forth the only grounds permitting the grant of a new trial and, therefore, limits the instances in which the trial court’s discretion may be exercised.” *State v. Cantu*, 129 Idaho 673, 674 (1997). While Idaho Criminal Rule 34 allows a trial court to grant a new trial “if required in the interest of justice,” the rule “simply states the standard that the trial court must apply when it considers the statutory grounds.” *Id.* Among the statutory grounds for the grant of the new trial are “[w]hen the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.” I.C. § 19-2406(5).

2. The District Court Erred In Deciding A Question Of Law Arising During the Course Of The Trial When It Admitted The Audio Recordings Into Evidence, Because The State Did Not Provide Proper Foundation To Admit Them

Here, the district court abused its discretion when it denied Mr. Bradley’s motion for a new trial, because the district court erred in deciding a question of law arising during the course of the trial when it admitted the audio recordings of the telephone calls into evidence. As explained above, the district court abused its discretion when it admitted the recordings into evidence, because the State did not provide proper foundation to admit them. Mr. Bradley incorporates his above discussion herein, which shows that the district court abused its discretion when it admitted the recordings into evidence. Thus, the district court erred in deciding this question of law arising during the course of the trial. See I.C. § 19-2406(5).

3. Mr. Bradley Is Entitled To A New Trial Because The District Court’s Error Affected A Substantial Right

The district court’s error entitles Mr. Bradley to a new trial, because the error affected a substantial right. “In the case of an incorrect ruling regarding the admission

of evidence, a new trial is merited only if the error affects a substantial right of one of the parties.” *Evans v. State*, 135 Idaho 422, 426 (Ct. App. 2001) (citing I.C.R. 61; *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 345 (1999)). The analysis for whether an error has affected a substantial right is closely related to the analysis for harmless error: “The determination of whether a substantial right has been affected hinges on whether it appears from the record that the error contributed to the verdict.” *State v. Rupp*, 118 Idaho 17, 19 (Ct. App. 1990) (quoting *State v. Boehner*, 114 Idaho 311, 315 (Ct. App. 1988)).

As discussed above, the audio recordings were crucial to the State’s case against Mr. Bradley, and it cannot be said that the error “did not contribute to the verdict obtained.” See *Joy*, 155 Idaho at 11. Thus, the district court’s error affected a substantial right. See *Rupp*, 118 Idaho at 19. Mr. Bradley is therefore entitled to a new trial.

In sum, because the district court erred in deciding a question of law arising during the course of the trial, when it admitted the audio recordings into evidence, the district court abused its discretion when it denied Mr. Bradley’s motion for a new trial. The district court’s error entitles Mr. Bradley to a new trial, because the error affected a substantial right. Mr. Bradley’s conviction should be vacated and his case should be remanded to the district court for a new trial.

## II.

### The District Court Erred When It Denied Mr. Bradley’s Oral Idaho Criminal Rule 29 Motion For Judgment Of Acquittal, Because The Evidence Presented To The Jury Was Insufficient To Convict Him Of Trafficking In Methamphetamine

Mr. Bradley asserts that the district court erred when it denied his oral Idaho Criminal Rule 29 motion for judgment of acquittal, because the evidence presented to

the jury was insufficient to convict him of trafficking in methamphetamine. The district court's denial of the motion for judgment of acquittal should be reversed and Mr. Bradley's conviction should be vacated.

The relevant ground for Mr. Bradley's motion for judgment of acquittal was that there was insufficient evidence that Mr. Bradley had represented the weight of the substance. (See Tr., p.152, Ls.12-14; see also R., pp.96-99 (Mr. Bradley's arguments for why there was insufficient evidence); Tr., p.8, L.4 – p.10, L.5 (same).) The district court denied the motion for judgment of acquittal. (Tr., p.152, Ls.10-20.) However, the evidence presented to the jury was actually insufficient to convict Mr. Bradley of trafficking in methamphetamine.

A. Standard Of Review And Applicable Law

The standard of review for the denial of a motion for judgment of acquittal "is whether there was substantial evidence upon which a trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Hoyle*, 140 Idaho 679, 684 (2004). Substantial evidence exists when "a reasonable mind could conclude that a defendant's guilt as to such material evidence of the offense was proven beyond a reasonable doubt." *Id.* (internal quotation marks omitted). The appellate court conducts an independent review of the record to determine if there is no evidence upon which a guilty verdict could be based. *Id.* Where there is competent but conflicting evidence to sustain the verdict, the appellate court may not reweigh that evidence or disturb the verdict. *Id.* The appellate court will take all reasonable inferences in favor of the prosecution. *Id.*

The methamphetamine trafficking provision of the trafficking statute under which Mr. Bradley was charged provides that:

Any person who knowingly delivers, or brings into this state, or who is knowingly in actual or constructive possession of, twenty-eight (28) grams or more of methamphetamine or amphetamine or of any mixture or substance containing a detectable amount of methamphetamine or amphetamine is guilty of a felony, which felony shall be known as “trafficking in methamphetamine or amphetamine.”

I.C. § 37-2732B(a)(4). The trafficking statute also states that, “For the purposes of subsections (a) and (b) of this section the weight of the controlled substance as represented by the person selling or delivering it is determinative if the weight as represented is greater than the actual weight of the controlled substance.” I.C. § 37-2732B(c).

B. The Evidence Was Insufficient To Support The Jury’s Verdict, Because There Was No Substantial Evidence Upon Which The Jury Could Have Found The Essential Element Of Weight Beyond A Reasonable Doubt

Mr. Bradley asserts that the evidence was insufficient to support the jury’s verdict. Specifically, there was no substantial evidence upon which the jury could have found the essential element of the weight of the substance beyond a reasonable doubt. The substance weighed 27.63 grams (Tr., p.146, Ls.4-18), less than the 28 grams generally required by the trafficking statute. See I.C. § 37-2732B(a)(4). Thus, to prove the essential element of the weight of the substance, the State had to show under § 37-2732B(c) that Mr. Bradley represented that the weight was 28 grams or more.

Whether Mr. Bradley “represented” the weight of the substance within the meaning of the trafficking statute is an issue of statutory interpretation. *Cf. State v. Escobar*, 134 Idaho 387, 389 (Ct. App. 2000).<sup>4</sup> The interpretation of a statute is a

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<sup>4</sup> In *Escobar*, the Idaho Court of Appeals interpreted I.C. § 37-2732B(c) as “mak[ing] no distinction between offenses that involve a completed delivery and those that do not.” *Escobar*, 134 Idaho at 389. According to the Court, “under subsections [(a)(4)] and (c), a defendant may be convicted of trafficking in methamphetamine if the defendant represented the weight of the delivered substance to be twenty-eight grams or more,



question of law, over which appellate courts exercise free review. *State v. Hart*, 135 Idaho 827, 829 (2001). The Idaho Supreme Court has outlined the following rules of statutory interpretation. “The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.” *Verska v. Saint Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889, 893 (2011) (internal quotation marks omitted). “If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.”<sup>5</sup> *Id.* (internal quotation marks omitted). “We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature.” *Id.* (internal quotation marks omitted). “The asserted purpose for enacting the legislation cannot modify its plain meaning.” *Id.* (internal quotation marks omitted). Appellate courts do not have authority to revise or void “an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written.” *Id.* at 896. “If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial.” *Id.* at 893 (internal quotation marks omitted).

Title 37 of the Idaho Code does not define “represented.” See I.C. § 37-2701. This does not mean Section 37-2732B(c) is ambiguous, because the plain, usual, and ordinary meaning of “represented” may be gleaned from other sources. The most relevant definition of “representation” from the latest edition of *Black’s Law Dictionary* provides that a “representation” is “[a] presentation of fact—either by words or by

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even if the actual weight was less.” *Id.* The defendant in *Escobar* was charged under the methamphetamine trafficking provision of the trafficking statute before it was renumbered to I.C. § 27-2732B(a)(4). *Id.* at 388 n.1.

conduct—made to induce someone to act, esp. to enter into a contract; esp., the manifestation to another that a fact, including a state of mind, exists.” Representation, *Black’s Law Dictionary* (9<sup>th</sup> ed. 2009). The Merriam-Webster Online Dictionary’s most relevant definition of “represent” provides that the term means “to describe as having a specified character or quality.” Represent, *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/represent> (last accessed on Aug. 8, 2014.)

Applying the plain, usual, and ordinary meaning of “represented” from the above sources shows that there was insufficient evidence on the weight element because Mr. Bradley did not represent the weight of the substance. As explained above in Part I of the Argument, the district court abused its discretion when it admitted the audio recordings of the telephone calls into evidence, because the State did not provide proper foundation to admit them. Without the recordings, the State would have had no evidence that Mr. Bradley represented anything to Mr. Wyman, much less than he represented the weight of the substance.

Even if the district court did not abuse its discretion when it admitted the audio recordings into evidence, there was insufficient evidence on the weight element. Under the plain, usual, and ordinary meaning of “represented,” Mr. Bradley did not represent the weight of the evidence. Mr. Bradley never presented as fact, through his words or conduct, that the substance weighed an ounce (which equals 28.35 grams). While there was testimony from Sergeant Hildebrandt on how cover words were often used during drug deals in general (Tr., p.102, Ls.7-17), there was no testimony showing that Mr. Bradley or Mr. Wyman understood that a “full” or a “whole one” meant an ounce.

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<sup>5</sup> “A statute is ambiguous where the language is capable of more than one reasonable construction. An unambiguous statute would have only one reasonable interpretation.” *Verska*, 151 Idaho at 896 (citation and internal quotation marks omitted).

Further, Mr. Bradley's actions in going to the agreed-upon location with the substance in his truck did not represent the weight of the substance. At best, Mr. Bradley's conduct represented that he had the substance in his possession, but the conduct did not present or describe its weight. As Mr. Bradley's counsel put it at the hearing on the pretrial motion to dismiss,<sup>6</sup> "Maybe if you are an Iron Man, lifting weights, and you are grunting, you are representing that it is heavy, but you are not representing exactly how heavy it is. You are not going to represent a weight by your actions." (Tr., p.13, Ls.14-17.) In short, Mr. Bradley did not represent the weight of the substance. Thus, there was insufficient evidence on the weight element to convict.

Because there was no substantial evidence upon which the jury could have found the essential element of the weight of the substance beyond a reasonable doubt, the evidence was insufficient to support the jury's verdict. The district court therefore erred when it denied Mr. Bradley's Rule 29 motion for judgment of acquittal. The district court's denial of the motion for judgment of acquittal should be reversed and Mr. Bradley's conviction should be vacated.

### III.

#### The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Twelve Years, With Three Years Fixed, Following Mr. Bradley's Conviction For Trafficking In Methamphetamine

Mr. Bradley asserts that the district court abused its discretion when it imposed his unified sentence of twelve years, with three years fixed, because the indeterminate portion of the sentence is excessive. Mr. Bradley does not challenge the fixed portion of

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<sup>6</sup> Mr. Bradley's counsel incorporated this line of reasoning into his arguments on the Rule 29 motion for judgment of acquittal, because he told the district court that his arguments in favor of granting the motion for judgment of acquittal "are exactly the same as the motion to dismiss." (See Tr., p.152, Ls.12-15.)

his sentence, because the applicable mandatory minimum is three years. I.C. § 37-2732B(a)(4)(A). The district court should have instead imposed an indeterminate portion of three years, as Mr. Bradley requested.

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving “due regard to the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Strand*, 137 Idaho 457, 460 (2002).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (internal quotation marks omitted). Mr. Bradley does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Bradley must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* An appellate court, “[w]hen reviewing the length of a sentence . . . consider[s] the defendant’s entire sentence.” *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will “presume that the fixed portion of the sentence will be the defendant’s probable term of confinement.” *Id.*

Mr. Bradley submits that, because the district court did not give adequate consideration to mitigating factors, the indeterminate portion of his sentence is excessive considering any view of the facts. Specifically, the district court did not adequately consider Mr. Bradley’s substance abuse problems. The Idaho Supreme

Court has recognized substance abuse as a mitigating factor in cases where it found a sentence to be excessive. See, e.g., *State v. Nice*, 103 Idaho 89, 91 (1982). Mr. Bradley has been diagnosed with alcohol abuse and amphetamine dependence. (PSI, p.25.) He started using alcohol when he was fourteen years old, and amphetamines when he was thirty-two. (Presentence Report (*hereinafter*, PSI), p.26.) He reported using alcohol about twice a month, but would consume twelve beers in a sitting. (PSI, p.26.) He reported using methamphetamine about twice a week. (PSI, p.26.) Many of the entries in Mr. Bradley's criminal history, such as his six DUIs, are related to his substance abuse problems. (See PSI, pp.5-15, 22.) However, Mr. Bradley now recognizes that, as he told the district court during the sentencing hearing, he is "in fact an alcoholic and a drug addict." (Tr., p.216, Ls.6-8.) Mr. Bradley now desires rehabilitation to help him avoid the poor choices he has made. (Tr., p.216, L.13 – p.217, L.6.) Adequate consideration of Mr. Bradley's substance abuse problems should have led to a lesser indeterminate portion of the sentence.

The district court also did not adequately consider Mr. Bradley's difficult childhood. Mr. Bradley's first memories of his parents together involved the two of them drinking, and a lot of arguing. (PSI, p.16.) He described his father as a "bad alcoholic." (PSI, p.16.) When Mr. Bradley was twelve years old, his father left and was murdered in Alaska. (PSI, p.16.) His mother continued to drink while she took care of Mr. Bradley and his brother. (PSI, p.16.) Adequate consideration of Mr. Bradley's difficult childhood should have led to a lesser indeterminate portion of the sentence.

Perhaps most importantly, the district court did not give adequate consideration to how, despite his substance abuse problems and difficult childhood, Mr. Bradley contributes in many ways to his family and community. Jessica Bolton, Mr. Bradley's

girlfriend, reported that Mr. Bradley “will do anything to help anyone.” (Sealed Exs., p.138.)<sup>7</sup> His friends wrote the district court letters describing how Mr. Bradley is “a loving attentive father and son and a great friend” (Sealed Exs., p.139), “a very caring father” and “a very unselfish friend with a great deal of consideration for others” (Sealed Exs., p.140) and “a hard worker and willing to go the extra mile” (Sealed Exs., p.141). Virginia Morgan, a sixty-seven-year-old disabled widow, reported that Mr. Bradley “has always been there” when she asked for his help. (Sealed Exs., p.142.)

Mr. Bradley’s friends and family describe him as a good man who has made mistakes, and is now willing to take responsibility for and learn from those mistakes. His mother, Donna Ray Bradley, stated that Mr. Bradley “is a person of good moral character. . . . I have seen him go through ups and downs, but all the while I have been convinced that he is a decent person at the core.” (Sealed Exs., p.137 (emphasis in original).) Ms. Bradley wrote, “**Dwayne** has made mistakes, and **he** is incredibly remorseful, and is willing to do whatever it takes to make preparations, financially and emotionally, if possible.” (Sealed Exs., p.137 (emphases in original).) Similarly, Ms. Bolton stated that “Dwayne is not a threat to the public or a flight risk and if given the chance he will prove that to you with his actions from here on out.” (Sealed Exs., p.138.) One of Mr. Bradley’s friends wrote that “I truly believe with some supervision, a little help, and the desire I believe Dwayne has to be a good father and productive member of society that he will make every effort to get his life back on track.” (Sealed Exs., p.139.)

Mr. Bradley would not have received such support from his friends and family if he did not enrich their lives. Despite his mistakes, Mr. Bradley contributes in many

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<sup>7</sup> All citations to the Sealed Exhibits refer to the 142-page PDF document.

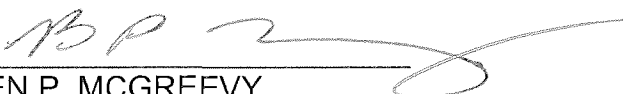
ways to his family and community. Adequate consideration of those contributions should have resulted in a lesser sentence.

Because the district court did not adequately consider the above mitigating factors, the indeterminate portion of Mr. Bradley's sentence is excessive considering any view of the facts. Thus, Mr. Olson submits that the district court abused its discretion when it imposed the unified sentence of twelve years, with three years fixed.

### CONCLUSION

For the above reasons, Mr. Bradley respectfully requests that this Court vacate his conviction. Alternatively, Mr. Bradley respectfully requests that this Court vacate his conviction and remand his case for a new trial. Alternatively, Mr. Bradley respectfully requests that this Court reverse the district court's denial of the motion for judgment of acquittal and vacate his conviction. Alternatively, Mr. Bradley respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 11<sup>th</sup> day of August, 2014.

  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11<sup>th</sup> day of August, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:


DWAYNE A BRADLEY  
INMATE #75505  
ISCI  
PO BOX 25  
BOISE ID 83707

BENJAMIN R SIMPSON  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

RICK BAUGHMAN  
ATTORNEY AT LAW  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010

Hand delivered to Attorney General's mailbox at Supreme Court.

  
\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas